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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 519.

WILLIAM A. S. DOUGLAS and THE AMERICAN MERCURY, INC.,
Petitioners,

v.

ELIJAH WILLIAM CUNNINGHAM and POST PUBLISHING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

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INDEX.

	PAGE
I. The Opinions of the Lower Courts	1
II. Jurisdiction of this Court	1
III. Statement of the Case	2
IV. Specification of Errors	4
V. The Evidence Clearly Justifies the Damages Awarded By the District Judge. On the Evidence There Was No Abuse of the District Court's Discretion	6
(a) Petitioners' Evidence as to the Value of Their Copyright in the Short Story "Ku Klux"	6
VI. The Respondent Cunningham's Infringement Was Not Innocent	8
(a) The Burden of Proving Innocent Infringement by Cunningham Was Upon the Respondents and Was Not Sustained	9
(b) The Effect to be Given the Admission as to the Innocence of the Respondent Post Publishing Company	12
VII. The Amount of Statutory Damages to be Awarded Under Section 25 of the Copyright Act Within the Limits Provided Therein is Purely Discretionary. The $5000 Damages Awarded by the District Court Being Within Those Limits, as a Matter of Law There Could Be No Abuse of the District Court's Discretion in Awarding Those Damages in the Case of an Infringement and Sale of Infringing Copies of the Nature and Number Here Shown	15
1. The Statute	15
2. The Decisions	17
(a) The Decisions of this Court	17
(b) The Decisions of other Circuit Courts of Appeals and District Courts	20
3. The Legislative History of Section 25	22
VIII. The Decision of the Circuit Court of Appeals Violates the Settled Rules of Statutory Construction Laid Down By This Court	27

PAGE

The Majority Decision of the Circuit Court of Appeals Constitutes Judicial Legislation 28
IX. Reply to Additional Arguments of Respondents 31
Request for Additional Attorneys' Fee 35
Conclusion 36

APPENDIX 39

TABLE OF CASES, STATUTES AND TEXT BOOKS.

I. CASES.

Abrams v. United States, 250 U. S. 616 31
Altman v. New Haven Union Co., 254 F. 113 8
American Code Co. v. Bensigner, 282 F. 829 13
Birdsall v. Coolidge, 93 U. S. 64 23
Brady v. Daly, 175 U. S. 148 23
Caminetti v. United States, 242 U. S. 470 29
Campbell v. Wireback, 269 F. 372 ..... 21, 34
Christian v. American Druggist Syndicate, 285 F. 359 14
Clarke v. White, 12 Pet. 178 11
Coupe v. Royer, 155 U. S. 565 23
Cunningham et al. v. Douglas et al., 72 F. (2d) 536 1
Dobson v. Hartford Carpet Co., 114 U. S. 439 23
Dooley v. Pease, 180 U. S. 126 31
Dowling v. Jones, 67 F. (2d) 537 11
Earnshaw v. United States, 146 U. S. 60 30
Ebert v. Poston, 226 U. S. 548 29
Encyclopedia Britannica Co. v. American Newspaper Ass'n., 130 Fed. 460; Affirmed 134 Fed. 831 9
General Drafting Co. Inc. v. Andrews, 37 F. (2d) 54 ..... 10, 34
Gerlach-Barklow Co. v. Morris & Bendien, 23 F. (2d) 159 11
Graves v. United States, 150 U. S. 118 12
Hein v. Harris, 183 Fed. 107 9
Hendricks Co., S. E., v. Thomas Pub. Co., 242 Fed. 37 ..... 20, 34
Herencia v. Guzman, 219 U. S. 44 31
Isaacs v. United States, 159 U. S. 489 30

PAGE

Jewell-LaSalle Realty Company v. Buck, 283 U. S. 202 ..... 15, 18, 27, 32, 34
Kirby v. Tallmadge, 160 U. S. 379 12
Lake County v. Rollins, 130 U. S. 662 29
The Luminary, 8 Wheat. 407 12
Luther v. Borden, 7 Howard 1 27
Mammoth Oil Co. v. United States, 275 U. S. 12 12
Mandeville v. Wilson, 5 Cranch 15 30
Martin v. Mott, 12 Wheaton 19 27
Maxwell v. Moore, 22 Howard 185 29
Mullan v. United States, 140 U. S. 240 28
Myers v. Pittsburgh Coal Co., 233 U. S. 184 31
New Jersey v. Anderson, 203 U. S. 483 29
New Jersey Steamboat Co. v. Brockett, 121 U. S. 637 14
New York City v. Ransom, 23 Howard 486 23
New York etc. R. R. Co. v. Winter, 143 U. S. 60 31
No-Leak-O Piston Ring Co. v. Norris, 277 Fed. 951 ..... 22, 33
Passavant v. United States, 148 U. S. 214 30
Pennsylvania Co. v. Roy, 102 U. S. 451 14
Philadelphia & Reading Co. v. Derby, 14 How. 468 14
Philadelphia & Trenton Railroad Company v. Stimpson, 14 Peters 488 28
Rude v. Westcott, 130 U. S. 152 23
Runkle v. Burnham, 153 U. S. 216 12
St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281 29
Sauer v. Detroit Times Company, 247 Fed. 687 22
Schellberg v. Empringham, 36 F. (2d) 991 34
Silsby v. Foote, 14 Howard 218 30
Tiffany Productions Inc. v. Dewing, 50 F. (2d) 911 22
Turner & Dahnken v. Crowley, 252 F. 749 32
United States v. Chemical Foundation, Inc., 272 U. S. 1 28
United States v. Goldenberg, 168 U. S. 95 29
United States v. Poland, 251 U. S. 221 11
United States v. Standard Brewery, Inc., 251 U. S. 210 29
United States v. Union Pacific Railroad Company, 91 U. S. 72 28
Warren v. White & Wyckoff Mfg. Co., 39 F. (2d) 922 34
Washington Gas Light Co. v. Landsden, 172 U. S. 534 13
Waterson, Berlin & Snyder Co. v. Tollefson, 253 Fed. 859 22

PAGE

L. A. Westermann Co. v. Dispatch Printing Co., 249 U. S. 100.. 2, 17, 26, 30, 32
Whitehead v. Galloway, 249 U. S. 79..... 29
M. Witmark & Sons v. Calloway, 22 F. (2d) 412..... 9, 13
M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 472; affirmed 2 F. (2d) 1020..... 14, 22
Witwer v. Harold Lloyd Corporation, 46 F. (2d) 792 32
Wright-Blodgett Co. v. United States, 236 U. S. 397..... 11

II. STATUTES.

Revised Statutes 4964, 4966, 4967.....22, 23
Title 28, U. S. Code, Section 347..... 2
Title 17, U. S. Code, Section 25 .....2, 3, 15, 16

III. TEXT BOOKS AND PUBLICATIONS.

The American Mercury, March 1928, No. 51, Vol. 13..... 12
"Arguments Before the Committees on Patents in the Senate and House of Representatives Conjointly, on the Bills S. 6330 and H. R. 19853 to Amend and Consolidate the Acts Respecting Copyrights, December 7, 8, 9, 10 and 11, 1906." p. 106 at pp. 176, 177 .....24, 25, 26
Elder "Our Archaic Copyright Laws", pp. 22–24, Feb. 11, 1903, 24
Cooley on Torts, (4th Ed.) Section 84, pp. 271, 272..... 13
62 Corpus Juris, Torts, Sec. 44..... 13
Drone on Copyright, pp. 403, 404 .....9, 10, 11
Weil on Copyright Law. Section 1047..... 9

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ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

I. THE OPINIONS OF THE LOWER COURTS.

The opinions of the Circuit Court of Appeals for the First Circuit in this case (Judge Bingham dissenting) are reported in *Cunningham et al.* v. *Douglas et al.*, 72 F. (2d) 536. The opinion of the District Court for the District of Massachusetts (Judge Lowell) was rendered orally from the bench and is unreported except in the record herein (R. p. 19).

II. JURISDICTION OF THIS COURT.

The grounds for jurisdiction are as follows:

1. The date of the judgment to be reviewed is the date of the final decree of the Circuit Court of Appeals for the First Circuit, August 9, 1934 (R. p. 39) reversing the decree of the District Court.

2. This decree was rendered in a suit in equity brought under

the copyright statutes of the United States to determine the validity and infringement of a certain copyright.

3. The statute under which jurisdiction is invoked is Title 28, U. S. Code, Section 347, as amended by the Act of February 13, 1925 (Judicial Code, Section 240a).

4. Jurisdiction of this Court and of the United States courts in copyright suits is sustained in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100.

5. Certiorari was requested on the ground that the decision of the Circuit Court of Appeals was in conflict with Section 25 of the Copyright Act, the decisions of this Court and with other Circuit Courts of Appeals.

6. The Petition for Writ of Certiorari was filed in this Court on November 7, 1934 and the writ granted December 3, 1934.

III. STATEMENT OF THE CASE.

This action was a suit in equity brought by the petitioner Douglas, in the United States District Court of Massachusetts, to enjoin and recover damages for the infringement of the copyrighted short story "Ku Klux" written by the petitioner Douglas, and published in the magazine The American Mercury for March 1928, No. 51, Volume 13. The copyright was one of many secured by the publisher, The American Mercury Inc., at one time, one blanket notice of copyright covering the entire contents of the March number and the copyright was duly registered by The American Mercury Inc. with the Register of Copyrights. Subsequently the copyright in the short story was assigned to the petitioner Douglas, who at the time of the infringement was, and now is, sole owner of the entire copyright and all rights in the short story.

The infringement charged is the publication of the same story in the Boston Sunday Post of August 30, 1931, published by respondent Post Publishing Company. The respondent Cunningham, under the name "Bill Cunningham", had rewritten the story in his own words, giving the characters different names but using the identical plot. The infringing story began on the front page of the first news section of the Sunday issue under the title "Klan Killed

Hero Of War" and was written up and published as news, although the episode and characters were entirely fictitious.

The original Bill of Complaint was brought in the name of the petitioner Douglas, as sole party plaintiff. This bill was dismissed by Lowell, D. J., on motion of defendants, on the ground that The American Mercury Inc., having secured the copyright by publication with notice of copyright and registering it, was a necessary party plaintiff. (See opinion of Lowell, D. J., R. pp. 12, 13.) An amended Bill of Complaint was thereupon filed joining The American Mercury as a party plaintiff. The case was tried thereon, November 10, 1933.

At the trial respondents admitted both the infringement and the validity of the petitioners' copyright, and that 384,834 copies of the Sunday Post containing the infringing story were printed (R. p. 18, fol. 20). The only question left for the District Court, therefore, was the amount of damages.

The petitioners offered evidence showing the substantial value of the story "Ku Klux" and that it had been regarded as of great value by publishers, motion picture and stage people and others qualified to judge. This evidence is discussed more in detail below (pages 6 and 7 of this brief).

The respondent Cunningham testified that he got the story from another news reporter. This testimony was entirely uncorroborated and in response to a direct question from the Court, Cunningham stated that he had not read Mr. Douglas' story in The American Mercury (R. p. 18, fol. 19; Addendum to R. p. 27).

Petitioners admitted at the trial the innocent infringement by the respondent Post Publishing Company (R. p. 17), but at no time have they conceded the innocence of the respondent Cunningham, and, in fact, flatly deny it.

Being unable to prove actual damages, the petitioners relied upon the statutory damages which might be awarded by the court in lieu of actual damages, under Section 25 of the Copyright Act (Title 17, U. S. Code, Sec. 25). On all the evidence and at the close of the case, the District Court (Lowell, J.) granted an injunction and awarded petitioners $5000 as damages, $1500 as a

reasonable attorney's fee, and costs (R. p. 19). The damages awarded were at the rate of $1 per infringing copy up to 5000 copies. The award, however, was suspended for the argument of the question of law raised by the respondents whether the Court had power to award this amount when no actual damages were proved. Briefs were submitted upon this point within one week, but in the meantime Judge Lowell had become ill and subsequently died before being able to pass upon the point in question. The case was accordingly submitted to District Judge Brewster of the District Court of Massachusetts at the point where Judge Lowell had left it and Judge Brewster handed down a decision dated December 14, 1933, finding the respondents' point of law without merit, and affirming the original award. (See R. pp. 13–15.) The final decree, therefore, was signed by Judge Brewster.

The defendants appealed, and on appeal the Circuit Court of Appeals for the First Circuit (Judge Bingham dissenting) held the award of $5000 to be so unreasonable and unjust as to amount to an abuse of the discretion given the Court under Section 25 of the Copyright Act, and reduced the award of damages to $250, the minimum permitted by the Act, and reduced the attorney's fee to $750.

The plaintiffs-appellees thereupon filed a petition for writ of certiorari in this Court November 7, 1934 and the writ was granted December 3, 1934.

IV. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the First Circuit erred in holding that the award of $5000 statutory damages was an abuse of the discretion of the District Court.

2. The Circuit Court of Appeals for the First Circuit erred in holding that the District Court was not authorized, under Section 25 of the Copyright Act where the respondents made and sold more than 5000 infringing copies of the petitioners' short story, to award $5000 as statutory damages.

3. The said Court erred in modifying and in not affirming the

decree of the District Court awarding $5000 as damages and in awarding costs to the respondents.

The case therefore raises the following questions:

1. Whether the District Court is empowered by Section 25 of the Copyright Act to award, in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages, in its discretion, to allow $1 for every infringing copy made and sold by the infringer, except that such damages shall not exceed the sum of $5000, nor be less than the sum of $250.

2. Whether, under Section 25 of the Copyright Act, the allowance by the District Court of $5000 as damages in lieu of actual damages constitutes an abuse of the District Court's discretion, where the respondents made and sold more than 5000 infringing copies of the petitioners' short story.

3. Whether, where Section 25 of the Copyright Act empowers the District Court to award to the copyright proprietor, in lieu of actual damages and profits, such damages as to the court shall appear to be just, except that such damages shall not exceed the sum of $5000 nor be less than the sum of $250, the award of $5000 is so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court under Section 25 of the Copyright Act.

The decision of the Circuit Court of Appeals (majority opinion) is contrary to the express language of Section 25 of the Copyright Act, to the decisions of this Court, and of the other Circuit Courts of Appeals and District Courts, and ignores the most settled principles of statutory construction, and of law. These various matters will now be considered in detail.

V. THE EVIDENCE CLEARLY JUSTIFIES THE DAMAGES AWARDED BY THE DISTRICT JUDGE. ON THE EVIDENCE THERE WAS NO ABUSE OF THE DISTRICT COURT'S DISCRETION.

(a) Petitioners' Evidence as to the Value of Their Copyright in the Short Story "Ku Klux".

Apart from the fact that, as a matter of law in the case of an infringement and sale of infringing copies of the nature and number here shown, there can be no abuse of discretion in awarding statutory damages within the limitations of Section 25 (discussed *infra*) —the evidence adduced by the petitioner Douglas, as to the value of his short story "Ku Klux" infringed by the respondents, clearly justified the award of maximum damages in the exercise of the District Court's discretion.

The story "Ku Klux" is a valuable piece of literary property. Mr. Douglas is a newspaper man of the highest standing and the author of a great many successful short stories published in the leading magazines. He is accustomed to creating literary property of great merit and of considerable worth. The attention of the Court is invited to Mr. Douglas' testimony as to his experience and to his highly interesting career, as reproduced in full in the Addendum to the Transcript of Record (R. pp. 21–25).

Mr. Douglas was offered publication of his story "Ku Klux" in a book of short stories published by Alfred Knopf & Co. of 750 Fifth Avenue, New York City, shortly after its publication (R. pp. 17, 23). He was offered $1,500 for the motion picture rights to the story a few months after it appeared, by Mr. Henry Aitken (R. pp. 16 and 23). (Mr. Aitken is a prominent motion picture producer.) The offer was not accepted because Mr. Halperin, the general manager of the stage magazine "Variety", told him that he could get many times that much if the story was first put on as a stage play (R. pp. 17 and 25). Mr. Al Woods, a play producer, promised Mr. Douglas that he would produce it, and on the strength of that promise, Mr. Douglas spent $450 having the story adapted for presentation upon the stage (R. pp. 17 and 23). The

play, however, was not produced on the stage. As Mr. Douglas said:

> "It would have been put on the stage but for the depression. Mr. Woods had an option on it; Al Woods held it for 6 months; then he went broke and couldn't do it. He promised that he would put it on." (R. p. 25.)

These offers from a book publisher, a motion picture producer, a play producer to publish or produce the story "Ku Klux" in book form, in the motion pictures and on the stage, show very conclusively what people competent to judge thought of Mr. Douglas' story "Ku Klux". They obviously thought it a story of great potential value. The fact that Mr. Douglas was willing to spend $450 out of his own pocket to have the story adapted for presentation upon the stage shows very clearly what Mr. Douglas thought as to its value.

What the respondents Post Publishing Company thought of the story is clearly shown from their publishing it as a feature news article on the front page of their Sunday edition. Giving the story such prominence obviously shows that they thought the story an excellent one and of considerable worth. *The respondent Cunningham himself paid Mr. Douglas the sincerest tribute of all to the value of the story*—by copying it, and attempting to gain the credit of being its author among the readers of the Boston Sunday Post. Even Mr. Cunningham testified as to the alleged "Martin" version of the story: ". . . on my way home I opened it and read it, and *I was very greatly impressed with the drama of it*" (R. p. 26).

On this evidence, therefore, it is obvious that the District Court could properly hold that literary property of considerable value had been flagrantly appropriated by the respondents, and in the exercise of the discretion permitted by the Copyright Act, that respondents must respond in damages in the amount of $5000. As the District Court (Lowell, J.) said (R. p. 19): "It is perfectly clear to me that the infringement was more than the statutory sum of $5000."

VI. THE RESPONDENT CUNNINGHAM'S INFRINGEMENT WAS NOT INNOCENT.

Before considering the main proposition of law here involved, and on which certiorari was granted, it is necessary to consider briefly several minor propositions which have been previously urged by respondents or regarded by the Circuit Court of Appeals (majority opinion) as having a bearing on the question of damages and the asserted abuse of the District Court's discretion.

The respondent Cunningham testified that he got the story from another news reporter named "Abie Martin" (R. pp. 18 and 26) and, in response to a direct question from the Court, said he had not read Mr. Douglas' story in the Mercury (R. pp. 18 and 27). He offered only his own statement, entirely uncorroborated, that he had gotten his story innocently from another. He did not produce "Abie Martin", take his deposition, or even show that he had tried to get in touch with him. He did not even produce "Martin's" alleged version of the story on copy paper (R. p. 26).

Respondents now insist that Cunningham's testimony must be accepted as complete proof that Cunningham's infringement was innocent. But if respondents are so anxious to have Cunningham's infringement accepted as innocent, why did they not prove it by credible testimony? The charge of plagiarism against an author is a serious one, and an author who values his literary reputation would produce all the legal evidence possible to prove his innocence and to clear his name. This the respondent Cunningham has not even attempted to do. We are now asked to "presume" as true the evidence he has failed to produce.

Whether in fact the infringement by the respondent Cunningham was innocent or not is, of course, entirely immaterial. As Judge Thomas said in *Altman* v. *New Haven Union Co.* (D. C. D. Conn.), 254 Fed. 113, at 119:

> "And as a last defense the defendant pleads, and the court finds as a fact, that its infringement was entirely innocent. Under the law, is that a defense? The law is decisive and clear on this point, and rules against the defense, for *it has*

been repeatedly held that ignorance of a copyright, or honest intention, affords no defense to an action for infringement."

See also—

M. Witmark & Sons v. *Calloway* (D. C. E. D. Tenn. N. D.), 22 F. (2d) 412 at 414.

Hein v. *Harris*, 183 Fed. 107 (C. C. A. 2).

Drone on Copyright, pages 403, 404.

Weil on Copyright Law, Section 1047, page 401.

The District Court, therefore, had the power to award $5000 damages at the rate of $1 per infringing copy, in its discretion, regardless of the innocence of the infringement.

(a) The Burden of Proving Innocent Infringement by Cunningham was Upon the Respondents and was Not Sustained.

But if the respondents wish respondent Cunningham's infringement to be accepted as innocent, the burden of proving his innocence was upon them, and the burden was not sustained. *The petitioners having proved the infringement from the obvious similarities between the petitioners' and respondents' stories,* they made out a prima facie case and a presumption of unlawful copying arose.* The infringement was, in fact, so glaring that the respondents have admitted it. If the respondents regarded it as material to establish Cunningham's innocence the burden was upon them to do so by credible testimony. As Judge Lanning said in *Encyclopedia Britannica Co.* v. *American Newspaper Ass'n.*, 130 Fed. 460, in discussing the infringement at page 464:

". . . It is sufficient to say that the proofs show such identi-

*In the Appendix to this Brief, petitioners have compared the similarities between the Douglas and Cunningham stories in parallel columns. The respondent Cunningham's first defense to the plagiarism charge was that he and Mr. Douglas were merely writing their own versions of a true story, (Answer, Para. 10. R. p. 3). He explained in correspondence to Mr. Douglas "there is certainly no copyright upon a news event provided a man uses his own words and tells the tale his own way". When he learned that the Douglas story was entirely fictitious, the first defense was dropped, and the "Abie Martin" defense was advanced.

ties and resemblances of plan and language, and such common sequences of thought, between the two articles on each of the seven subjects, that no other opinion can be entertained than that very considerable portions of the defendant's articles were taken from the complainant's articles. . . . It is true that Peale says that the articles furnished to him by these authors were printed exactly as they were written. *But he stands alone in this statement. The convincing evidence furnished by the articles themselves overcomes his naked statement. Substantial identity, or a striking resemblance between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant.* Drone on Copyright, pp. 400, 430."

Affirmed in 134 F. 831 (C. C. A. 3).

In *General Drafting Co., Inc.* v. *Andrews* (C. C. A. 2), 37 F. (2d) 54, Judge Mack said at pages 56, 57:

"But in our judgment plaintiff established a strong prima facie showing of copying by pointing out a convincing number of similarities in style, appearance, and selection of roads and towns, and a relatively great number of identical errors and peculiarities in spelling between its and defendants' maps. . . . This showing clearly threw upon defendant the burden of going forward with evidence to explain such similarities. *Encyclopaedia Britannica Co.* v. *American Newspaper Ass'n*, (C. C.) 130 F. 460.

To meet the prima facie case, defendants offered a single witness, Tudor, who had prepared the alleged infringing map, and who had been employed by plaintiff up to 1925. . . .

From the entire record, we can find no possible explanation of the mistakes common to both maps, particularly those which do not appear on defendants' alleged base maps, except direct copying."

In *Drone on Copyright*, the author states (p. 400):

"*Similarity Creates Presumption of Copying.*—Substantial identity, or a striking resemblance, between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant."

(Page 430):

"*Presumption of Copying Created by Likeness must be Overcome by Defendant.*—When the publication complained of contains resemblances striking enough to warrant the inference of piracy, it is for the defendant to show that the likeness is not the result of copying from the complainant's work."

See also—

Clarke v. *White*, 12 Pet. 178.
United States v. *Poland*, 251 U. S. 221, 227–228.
Wright-Blodgett Co. v. *United States*, 236 U. S. 397, 403.
Gerlach-Barklow Co. v. *Morris & Bendien*, 23 F. (2d) 159 (C. C. A. 2).
Dowling v. *Jones*, 67 F. (2d) 537, at 539 (C. C. A. 2).

But the Circuit Court of Appeals (majority opinion) has gone to great lengths and ignored the most settled judicial practices in its effort to have the respondent Cunningham regarded as innocent, and to justify its own reversal of the District Court. Said Judge Wilson (R. p. 32):

"The only inference is that Martin pirated the facts from the story in the American Mercury Magazine, unless Cunningham deliberately committed perjury in court, and he, at least, is entitled to the presumption of innocence of this crime."

This burden on the respondents of going forward with evidence to show innocent infringement certainly is not met by any "presumption of innocence", and by "presuming" that Cunningham's story is truthful. Rather any presumptions drawn must be drawn against the respondents—that having all the evidence in their control whereby it could be shown that the respondent Cunningham

acted innocently, and failing to produce it, the presumption is that such evidence did not exist or was unfavorable. See:

Mammoth Oil Co. v. *United States*, 275 U. S. 13, at 51, 52 (Mr. Justice Butler).
Kirby v. *Tallmadge*, 160 U. S. 379, 383.
Runkle v. *Burnham*, 153 U. S. 216, 225–226.
The Luminary, 8 Wheat. 407.
Graves v. *United States*, 150 U. S. 118, 121.

Having failed to produce the evidence entirely in their possession (if any), whereby Cunningham's innocence might have been established, and failing to meet their burden of proof, respondents cannot now be heard to complain if Cunningham's testimony is not believed, in view of the strong evidence of *unlawful copying* found in the record. On all the evidence, and weighing the inherent probabilities, the District Court as trier of the facts, would have been justified in concluding that *the respondent Cunningham was not telling the truth on the witness stand*, when he said he had not read Mr. Douglas' story in The American Mercury (R. pp. 18 and 27).

(b) The Effect to be Given the Admission as to the Innocence of the Respondent Post Publishing Company.

Having no evidence of any guilty knowledge on the part of Post Publishing Company, petitioners conceded for the purpose of this suit that it acted innocently in the matter (R. p. 18). This concession was specifically limited to Post Publishing Company and *did not* include the respondent Cunningham.

However, the Circuit Court of Appeals in its majority opinion said (R. p. 32):

> "The admission that it was published innocently by the principal also includes in effect an admission that Cunningham the employee and agent of the Publishing Co. in gathering data for and writing special feature stories, had no knowledge that the story had been copyrighted."

This is a complete *non sequitur*. It disregards the most fundamental principles of law. The writing of the infringing story by Cunningham and its publication by Post Publishing Company was a joint tort for which they are jointly and severally liable. Both respondents joined in separate acts of infringement (*i. e.* writing and publishing) and are joint tort-feasors. *American Code Co.* v. *Bensinger*, 282 Fed. 829 at page 834 (C. C. A. 2.). As such they are jointly and severally liable *without regard to their degrees of culpability*. As this Court said (Mr. Justice Peckham) in *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534 at 551, 552:

> "The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against the company alone. . . . Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, *without examining the question of the different degrees of culpability*. And if but one is sued, he is liable for all the damages inflicted by the most culpable. Cooley on Torts, 133, 135, 136; *Currier* v. *Swan*, 63 Maine, 323; *Berry* v. *Fletcher*, 1 Dill. 67; *Pardridge* v. *Brady*, 7 Ill. App. 639; *McCarthy* v. *De Armit*, 99 Penn. St. 63, 72."

See also—

> 62 Corpus Juris, Torts, Section 44, page 1131;
> Cooley on Torts (4th Ed.) Liability for Unintentional Injury, Section 84, and particularly pages 271 and 272, as to newspaper libels.

This holding by the Circuit Court of Appeals (majority opinion) also ignores the entire doctrine of *respondeat superior*. Rather is the Post Publishing Company to be held liable for the acts of its agent and employee Cunningham, and the latter's guilty knowledge imputed to it—regardless of the Post's innocence, under well established rules of agency. As Judge Hicks said in *M. Witmark & Sons* v. *Calloway* (D. C. E. D. Tenn. N. D.), 22 F. (2d) 412 at

414, in holding a theatre owner liable for the infringement of copyright on a musical composition by his pianist:

> "Neither does the fact, if it is a fact, that young Williams, the operator of the player piano, borrowed this music without the direction, knowledge, or consent of the owner or manager of the theatre affect the question. *The rule of the common law applies, to wit, that the master is civilly liable in damages for the wrongful act of his servant in the transaction of the business which he was employed to do, although the particular act may have been done without express authority from the master, or even against his orders. McDonald* v. *Hearst* (D. C.) 95 F. 657; *M. Witmark & Sons* v. *Pastime Amusement Co.* (D. C.) 298 F. 470."

See also—

Christian v. *American Druggist Syndicate*, 285 Fed. 359, 361 (C. C. A. 2).

M. Witmark & Sons v. *Pastime Amusement Co.*, 298 Fed. 472 at 475 (D. C. E. D. S. C.), affirmed in 2 F. (2d) 1020.

Philadelphia & Reading Co. v. *Derby*, 14 How. 468, 486.

N. J. Steamboat Co. v. *Brockett*, 121 U. S. 637 at 645.

Pennsylvania Co. v. *Roy*, 102 U. S. 451 at 457.

On all the evidence therefore, and on the most fundamental principles of law the argument by the respondents that the infringement by the respondent Cunningham must be accepted as innocent is wholly without merit. On the record, as made by both petitioners and respondents, the infringement stands as particularly flagrant and wilful, and one without extenuating circumstances of any kind which would commend themselves to a court of equity. The District Court, sitting as a court of equity and in the exercise of its sound discretion, acted properly in awarding the maximum damages of $5000.

VII. THE AMOUNT OF STATUTORY DAMAGES TO BE AWARDED UNDER SECTION 25 OF THE COPYRIGHT ACT WITHIN THE LIMITS PROVIDED THEREIN IS PURELY DISCRETIONARY. THE $5000 DAMAGES AWARDED BY THE DISTRICT COURT BEING WITHIN THOSE LIMITS, AS A MATTER OF LAW THERE COULD BE NO ABUSE OF THE DISTRICT COURT'S DISCRETION IN AWARDING THOSE DAMAGES IN THE CASE OF AN INFRINGEMENT AND SALE OF INFRINGING COPIES OF THE NATURE AND NUMBER HERE SHOWN.

The decision of the Court of Appeals (majority opinion) conflicts (1) with the express language of the Statute itself, (2) with the decisions of this Court and of other Circuit Courts of Appeals and District Courts, and (3) with the clear meaning of the Statute as determined from its legislative history. These make it clear beyond any question that within the limits of $250 and $5000 the amount of damages awarded "in lieu of actual damages and profits" is purely discretionary with the District Court. *In the case of an infringement and sale of infringing copies of the nature and number here shown, any award of damages within those limits is just and reasonable, and as a matter of law there can be no abuse of the Court's discretion in awarding such damages.* The statute itself specifies the minimum and maximum damages which Congress regards as just and reasonable and sets the limits of the Court's discretion. *If the respondents believe the maximum limit of $5000 permitted by Section 25 is unreasonable, which petitioners deny, their remedy lies with Congress.* As Mr. Justice Brandeis said in *Jewell-LaSalle Realty Company* v. *Buck* (*infra*), pp. 207, 208:

> "*If* as applied to musical compositions, *the provisions of the entire section have proved unreasonable, the remedy lies with Congress.*"

1. The Statute:

The decision of the Circuit Court of Appeals conflicts with the express language of Section 25 of the Copyright Act. Section 25 of the Copyright Act, so far as here applicable, provides as follows:

"Section 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250 and shall not be regarded as a penalty. . . .

Second. In the case of any work enumerated in Section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

The words of the statute are clear and express as to the damages which are recoverable. The plaintiff may recover actual damages and profits, "or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow" . . . "$1 for every infringing copy made or sold by . . . the infringer" . . . except that "such damages" shall not "exceed the sum of $5000 nor be less than the sum of $250". Being unable to prove actual damages and profits, the petitioners were left to "such damages as to the court shall appear to be just" within the limits stated. The court was empowered to award $1 for every infringing copy, under paragraph Second, up to the limit of $5000. The respondents admittedly published 384,834 copies of the infringing story, many times more than 5000. The award of the District Judge, although the maximum permitted, was obviously within the limits provided by the statute. *The statute itself specifies the minimum and maximum amounts which Congress regarded as just and reasonable and sets the limits of the court's discretion.* There being more than 5000 infringing copies, there could be no abuse of the Court's dis-

cretion in awarding statutory damages within those limits. Under these circumstances, the award of damages within those limits cannot be held so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court. There can be no doubt as to the intent of Congress to provide for the maximum, as well as the minimum, amounts which may be awarded in lieu of actual damages, and that Congress regarded the amounts specified as just and reasonable.

2. The Decisions:

The decision of the Circuit Court of Appeals conflicts with the decisions of this Court and of other Circuit Courts of Appeals, and District Courts.

(a) The Decisions of this Court:

In *L. A. Westermann Company* v. *Dispatch Printing Co.*, 249 U. S. 100, this Court had under consideration the meaning of Section 25, and particularly the amount of damages allowable "in lieu of actual damages and profits". The copyrights were for pictorial illustrations of styles in women's apparel.

Mr. Justice Van Devanter said (pp. 106, 107) :*

> "On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they*

*(Italics ours throughout this brief.)

be more than $5000 nor less than $250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. *In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.*

Apart from the natural import of its words, the history of the provision makes strongly for this view. . . . In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the 'in lieu' provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—*that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained.*"

"The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just'. *Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.*"

In *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, this Court again had before it the "in lieu of" clause of Section 25. There the copyright covered a musical composition and the amounts allowable as damages under paragraph 4th of Section 25 (b) were in question. Certain questions were certified from the Circuit Court of Appeals for the Eighth Circuit.

Question II was as follows:

"Question II. 'In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called 'no other case', clause of Section 25 (b) of the Copyright Act (U. S. C. Title 17, Section 25), reading, 'and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?' "

Mr. Justice Brandeis said (pp. 207, 208):

"The definite specification of a maximum and minimum in every case, is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations. See *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 109, 63 L. Ed. 499, 502, 503, 39 S. Ct. 194. *If as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.* Question II, is answered in the affirmative."

Question III was as follows:

" 'Is Section 25 (b) Fourth of the Copyright Act (U. S. C. title 17, Section 25) applicable in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?' "

Mr. Justice Brandeis said (p. 208):

"This question has in part been necessarily answered by our discussion of question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of $250 must be made. *Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. See L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 63 L. ed.

100, 502, 30 S. Ct. 194. Subject to this limitation, question III is answered in the affirmative."

If more than 300 infringing performances were proved the District Court could, in its discretion, have awarded the maximum of $3000 at $10 per infringing performance. Substituting the words "$1 for each infringing copy" for the words "$10 a performance" in Mr. Justice Brandeis' statement above, the language applies directly to the present case.

(b) The decisions of other Circuit Courts of Appeals and District Courts.

The decision of the Circuit Court of Appeals conflicts with the decisions of the Circuit Courts of Appeals for the Second and Fourth Circuits and other District Courts.

In *S. K. Hendricks Co. v. Thomas Pub. Co.*, 242 Fed. 37, the Court of Appeals for the Second Circuit held the award of $2500 statutory damages for 2800 infringing copies of a copyrighted book, plus a reasonable attorney's fee of $2500, to be within the discretion of the District Court. Judge Hough, after quoting the pertinent provisions of Section 25, said (p. 41):

> "As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. In the *Mail & Express Co.* case, *supra*, we held that, in respect of an infringing publication coming under the same general category as does the present one, $250 was the minimum amount to which a plaintiff could be entitled. In *Gross v. Van Dyck Gravure Co.*, 230 Fed. 412, 144 C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, . . . but to estimate them within the sums given, without the limitations of

usual legal proof. The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof.' On appeal from that construction of the statute, this court approved the method pursued.

That the statute limits the discretion of the court to a minimum award of $250 and a maximum of $5000 in lieu of actual damages has also been held in *L. A. Westermann Co.* v. *Dispatch, etc. Co.*, 233 Fed. 609, 147 C. C. A. 417 (C. C. A. 6th)."

In *Campbell* v. *Wireback*, 269 Fed. 372, the Circuit Court of Appeals for the Fourth Circuit held the award of $4000 statutory damages for 1000 infringing copies of copyrighted advertising cuts not to be an abuse of the District Court's discretion. Judge Knapp said (p. 375):

"It appears that defendants prepared a catalogue of their appliances, including the infringing cuts, and had 4,000 copies printed. Of these some 750 had been distributed at the time of the trial; the others were still in their possession. In the opinion of the court below all that is said on the question of damages is this:

'The plaintiffs are entitled to an injunction and to a decree for the statutory $1 for each of the infringing copies found in defendants' possession and for the destruction of such copies.'

This is claimed to show that damages were assessed at $4,000, not in the exercise of discretion, but merely on the basis of the number of catalogues which defendants had printed, and therefore that it is not an award of 'such damages as to the court shall appear to be just,' as the statute provides. We do not so construe the award. The language is perhaps a little ambiguous, but the meaning and intent are not uncertain. The court is presumed to know the provisions of the Copyright Act, and to have exercised the discretion which that act enjoins, and the award must therefore be accepted, unless the contrary distinctly appears, as expressing its deliberate judgment

of what is just under the facts and circumstances developed at the trial. *In such a case as this, where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge.* This is distinctly held in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100. . . ."

See also:

No-Leak-O Piston Ring Co. v. *Norris*, 277 Fed. 951 at 954, where the Circuit Court of Appeals for the Fourth Circuit held the award of $3000 as statutory damages for the distribution of 15,000 copies of an infringing pamphlet, plus $750 attorney's fee, not to be an abuse of the District Court's discretion.

M. Witmark & Sons v. *Pastime Amusement Company*, 2 Fed. (2d) 1020, where the Circuit Court of Appeals for the Fourth Circuit upheld the award of $250 statutory damages for one performance of a musical composition as not an abuse of the District Court's discretion and affirmed the District Court, E. D. South Carolina, in 298 Fed. 370 at 480-482.

Waterson, Berlin & Snyder Co. v. *Tollefson*, 253 Fed. 859, D. C. S. D. California, S. D.

Sauer v. *Detroit Times Company*, 247 Fed. 687, D. C. E. D. Michigan, S. D.

Tiffany Productions Inc. v. *Dewing*, 50 F. (2d) 911, D. C. D. Maryland.

3. The Legislative History of Section 25:

That the amount of statutory damages awarded under Section 25 of the Copyright Act in lieu of actual damages and profits, within the limit of $250 and $5000 provided therein, is purely discretionary with the District Court can further be seen from the legislative history of Section 25.

Under the old Copyright law prior to the present Act of March 4, 1909 as amended, the recovery was limited to *actual damages proved* (except under the dramatic section R. S. 4966). R. S. 4964, 4966 and 4967, so far as here pertinent, read:

"Sec. 4964. Every person who . . . shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, *and shall also forfeit and pay such damages as may be recovered in a civil action* by such proprietor in any court of competent jurisdiction." (26 Stat. at Large, 1109.)

"Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, *such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just,*"*

"Sec. 4967. Every person who shall print or publish any manuscript whatever without the consent of the author or proprietor first obtained, *shall be liable to the author or proprietor for all damages occasioned by such injury.*" (26 Stat. at Large, 1109.)

The old law was singularly ineffective in providing any substantial remedy to prevent infringement. In most cases it was impossible, as it was for the petitioners here, to prove any *actual* damages. The court was obliged to award merely nominal damages † and the plaintiff had to go to large expense in many cases for legal services. Complaints and criticisms of the ineffectiveness of the old law were many.

Samuel J. Elder, Esq., an eminent Boston copyright lawyer addressed the Maine State Bar Association at the State House at

* R. S. 4966 was construed and upheld in *Brady* v. *Daly*, 175 U. S. 148.

†The rule of the common law that actual damages must be proved, and if unable to be proved, nominal damages only could be awarded, is illustrated in:

Coupe v. *Royer*, 155 U. S. 565.
Birdsall v. *Coolidge*, 93 U. S. 64.
Rude v. *Westcott*, 130 U. S. 152.
Dobson v. *Hartford Carpet Co.*, 114 U. S. 439.
New York City v. *Ransom*, 23 How. 486.

Augusta on February 11, 1903 on "Our Archaic Copyright Laws". Mr. Elder said (page 22):

> "I cannot refrain, however, from taking up as briefly as may be the various and conflicting provisions with regard to penalties. Nothing better illustrates the archaic condition of the law. . . .
>
> (Page 23): In the case of the unauthorized publication of a manuscript of any kind, the Statute Sect. 4967, merely gives the owner of the manuscript his *actual damages* for the invasion of his rights. . . .
>
> (Page 24): The provisions with reference to infringement of a copyright upon a book (Sect. 4964) are based on the idea of compensation to the owner of the copyright. It will be observed . . . that the damages to be recovered in money *are the damages actually sustained and not an arbitrary sum;* . . ."

Mr. Elder participated in drawing up the present Copyright Act, which sought to avoid the very defects he pointed out.

The Print Publishers of America addressed a memorandum to the Joint Committees on Patents which appears in the publication "Arguments Before the Committees on Patents in the Senate and House of Representatives Conjointly, On the Bills S6330 and HR19853 to Amend and Consolidate the Acts Respecting Copyrights, December 7, 8, 9, 10 and 11, 1906", which reads in part as follows (p. 106):

> "Under the present law it is notorious that there are no effective remedies for piracy in 90 per cent of the cases that arise. In our own domain recoveries are so rare that general contempt of the law exists. . . . The impunity with which the present law can be violated has encouraged infringements in this country to such an extent that many of the infringers have come to look upon their appropriations as vested rights. Naturally they are disturbed when effective remedies are proposed.
>
> Nor should we leave this session without suggesting a most important point. The very nature of copyright property is

such that many cases arise in which it is impossible to adequately measure the damages. . . . The difficulty of proving with definiteness actual pecuniary damages sustained has been recognized and Congress has frequently provided statutory rates of compensation. This has been approved by the Supreme Court (see *Brady* v. *Daly*, 175 U. S. 148)."

As a result of the widespread criticism, the Copyright Act and particularly the section relating to damages was revised throughout by committees of persons interested in the protection of literary property, under the direction of the Librarian of Congress. The common law rule as to the recovery of *actual* damages was retained, but, "in lieu of actual damages and profits", the Court was given the discretion to award "such damages as to the court shall appear to be just", within certain limits, and at an enumerated rate per infringing copy or performance, when a plaintiff was unable to prove *actual* damages.

Arthur Steuart, Esq., of the Baltimore Bar, Chairman of the Advisory Committee from the American Bar Association, who was a member of the Committee which drafted S. 6330, discussed the various provisions of the proposed copyright law in hearings before the Joint Committees on Patents of the Senate and House in 1906. (S. 6330, re-introduced in the Senate in 1909 as S. 9440, became with minor changes the present copyright Act of March 4, 1909). His remarks can be found in "Arguments Before the Committees on Patents . . ." (*supra*). Mr. Steuart said as to Section 23, now Sec. 25:

(Page 176): "The language of the Section, 'In lieu of actual damages and profits, such damages as to the court shall appear just,' would appear to put into the court the absolute right, where it was an equity case, to decide what should be allowed in the way of liquidated damages, subject, of course, to the limitations that it must not be less than $250 nor more than $5000; and that the amount which the court should determine should be decided by a computation of so much per copy according to the number of copies found. . . ."

(Page 177): ". . . It does seem to me very desirable that in this section in which we are trying to preserve the discretion of the court, the independent judgment of the court, we are trying to give to the court the power to assess liquidated damages, which will not be penal and will not be fixed. The court ought to have absolute discretion as to how much will be allowed as liquidated damages, in order that we may avoid all possible danger of creating a penal provision for the punishment of this kind of infringement. It seems to me that the words as they are used in the dramatic section, (R. S. 4966) 'such damages as appear to the court just' will certainly preserve the discretion of the court and give to the court the entire control over the whole question in a way that will avoid any possible danger of the act being construed to be penal."

There can be no question, therefore, as to the defects of the old copyright law and of the intent of those who drafted Section 25 of the present law, or of the intent of Congress in enacting it. The old law provided no adequate remedy, due to the difficulty of proving actual damages and in not permitting the court to award a reasonable attorney's fee. To remedy this defect the law was changed to permit the court, "in lieu of actual damages", to award "such damages as to the court shall appear just, and in assessing such damages, the court may in its discretion, allow". . . . "In case of" a book "one dollar for every infringing copy made or sold by . . . the infringer", "and such damages shall in no other case exceed the sum of $5000 nor be less than the sum of $250, and shall not be regarded as a penalty". There can be no doubt as to the meaning of that language. As Mr. Justice Van Devanter said in *Westermann Co.* v. *Dispatch Printing Company* (*supra*):

> "In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the expressed qualification that in every case the assessment must be within

the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. *Within these limitations the court's discretion and sense of justice are controlling. . . .*"

It was obviously the intent of Congress to put teeth into the copyright law and to prevent further willful and flagrant infringements with impunity by allowing absolute discretion to the court in assessing damages, within the limitations provided. There can be no question whatever as to the power of the District Court to award damages of $5,000 herein. If the respondents believe the maximum limitation in Section 25 is too high, their remedy lies with Congress. As Mr. Justice Brandeis said in *Jewell-LaSalle Realty Company* v. *Buck* (*supra*), 207 and 208:

> "If, as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress."

And, if the appellants present the facts of this infringement before Congress as an argument for lowering the discretionary limits of Section 25, it can be said with complete confidence that the law will *not* be changed.

VIII. THE DECISION OF THE CIRCUIT COURT OF APPEALS VIOLATES THE SETTLED RULES OF STATUTORY CONSTRUCTION LAID DOWN BY THIS COURT.

It is a settled rule of statutory construction established by this court that where a statute gives a discretionary power to an individual to be exercised by him on his own opinion of certain facts, the statute constitutes him the sole and exclusive judge of the existence of those facts. This proposition has many times been stated by this court. See:

Martin v. *Mott*, 12 Wheaton 19 at 32.
Luther v. *Borden*, 7 Howard 1, at 45.
Philadelphia & Trenton Railroad Company v. *Stimpson*, 14 Peters 448 at 458.

Mullan v. *United States*, 140 U. S. 240, at 245.
United States v. *Chemical Foundation, Inc.*, 272 U. S. 1, at 14 to 15.

Thus where Section 25 of the Copyright Act gives to the District Court the discretionary power to award such damages as to the court shall appear to be just within the limits of $250 and $5000, and in its discretion to award $1 for every infringing copy made or sold by the infringer, the statute clearly constitutes the District Court the sole and exclusive judge of the proper amount of damages to be awarded within these limits. The District Court must be presumed to properly discharge its official duty in assessing damages within the provisions of the statute, and an award of the damages within those limits, under the circumstances of this case cannot, as a matter of law, be held to constitute an abuse of the District Court's discretion.

The Majority Decision of the Circuit Court of Appeals Constitutes Judicial Legislation.

The Court of Appeals in ignoring the plain provisions of Section 25, permitting the award of $5000 maximum damages, has in effect read out of the statute the provision as to maximum damages. In so doing, it has indulged in judicial legislation and usurped the functions of Congress. If Section 25 in this particular case is unjust and works a hardship upon the respondents, which petitioners deny, the remedy lies with Congress, not with the Court of Appeals.

This Court has many, many times said that where the language of the statute is plain, the duty of the courts is to enforce it as written. The courts are not concerned with the wisdom of the law or its policy. That is the function of the legislature.

In *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, this Court by Mr. Justice Davis said (p. 91):

> "Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. *The rights of the parties rest*

upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended."

See also:

United States v. *Standard Brewery, Inc.*, 251 U. S. 210 at 217 (Mr. Justice Day).

St. Louis & Iron Mountain Ry. v. *Taylor*, 210 U. S. 281 at 295 (Mr. Justice Moody).

New Jersey v. *Anderson*, 203 U. S. 483 at 489, 490.

Caminetti v. *United States*, 242 U. S. 470 at 485.

Whitehead v. *Galloway*, 249 U. S. 79, 84 to 85.

United States v. *Goldenberg*, 168 U. S. 95, 102.

Lake County v. *Rollins*, 130 U. S. 662, 670, 671.

Maxwell v. *Moore*, 22 Howard, 185 at 191.

Ebert v. *Poston*, 266 U. S. 548 at 554.

Judge Bingham vigorously dissented from the majority opinion of the Circuit Court of Appeals and held that the award of $5000 damages should be affirmed. (See his dissenting opinion R. pp. 34–37.) Judge Bingham said (R. p. 37):

> "To interpret the statute, as applied to the circumstances here disclosed, to mean that the District Judge, in awarding damages at a dollar a copy up to $5000, abused his discretion, would be a travesty on the law and in effect to read out of the statute the provisions of Section 25 (b) and subdivision second, authorizing an award of '$1 for every infringing copy made or sold' up to $5000."

The majority of the Court of Appeals may have thought that the award of $5000 damages was too high. But they cannot properly hold that the District Court did not have the power to award the $5000, damages in its discretion, or that the award was an abuse of the District Court's discretion. In so holding they were

substituting their own discretion for that of the District Court, who heard the evidence and saw the witnesses—and Congress has said that it is the discretion of the District Court which is controlling, within certain minimum and maximum limits—not that of the Circuit Court of Appeals. *cf. Passavant* v. *United States*, 148 U. S. 214, at 219–220. Their own idea as to damages does not justify their disregarding the statute, and ignoring the express provision for the allowance of a $5000 maximum. ***By their construction they have reached a remarkable and unique result—A statute which by express language gives the District Court discretion to award damages within certain limits is construed to mean the exact opposite—that the District Court has no discretion to award damages within those limits.***

It is a settled rule of appellate courts that discretionary matters are not reviewable except for abuse.

> *Earnshaw* v. *United States*, 146 U. S. 60 at 68.
> *Isaacs* v. *United States*, 159 U. S. 487 at 489.
> *Silsby* v. *Foote*, 14 Howard 218 at 220.
> *Mandeville* v. *Wilson*, 5 Cranch 15.

And when Congress empowers a court to act in its discretion within certain limits, there obviously can be no abuse of discretion when the court acts within those limits. As Mr. Justice Van Devanter said in *L. A. Westermann Co. v. Dispatch Printing Company* (*supra*), "Within these limitations, the court's discretion and sense of justice are controlling, . . ."

Congress in Section 25 of the Copyright Act gave the District Court complete discretion to award "in lieu of actual damages and profits, such damages as to the court shall appear to be just" within certain limits. In such a situation the award of damages is like the verdict or findings of fact by a jury or by the court in a jury-waived case. The review of the appellate court is limited to determining whether there was any evidence tending to sustain the verdict or findings of fact. If so, the verdict or findings are conclusive. It is entirely immaterial that on the evidence the appellate court may have reached a different result.

Dooley v. *Pease*, 180 U. S. 126 at 131–2.
Myers v. *Pittsburgh Coal Co.*, 233 U. S. 184 at 193.
Herencia v. *Guzman*, 219 U. S. 44 at 45.
Abrams v. *United States*, 250 U. S. 616, at 619.
New York etc. R. R. Co. v. *Winter*, 143 U. S. 60, at 75.

IX. REPLY TO ADDITIONAL ARGUMENTS OF RESPONDENTS.

(1) In their brief opposing the petition of certiorari the respondents said (p. 1):

> "The petitioner is bound by his admissions in the District Court (1) that there were no damages shown (Rec. p. 20). It is to be noted that the petitioner did not concede merely that he had no proof of actual damage but that there was no damage at all shown—not even nominal."

If by this statement and by the word "shown" it is meant that petitioners have admitted that they *suffered* no damages whatever, the statement is not correct. The petitioners have admitted that they were unable to "show" damages, using the word in its usual sense as meaning *to prove*. The admission in question was (Rec. p. 18):

> "I do not think we show any damages, Your Honor, and we invoke the specific sections of the statute which provide for $1.00 for each infringing copy and the amount of damages to be awarded by the court."

This statement merely brought petitioners' case under the alternative provisions of section 25, where "in lieu of *actual* damages and profits" the court might award "such damages as to the court shall appear to be just". The petitioners had, of course, suffered damages from the admitted infringement, and from the admitted violation of their property rights, but were unable to prove them, as is usual in copyright cases. The District Court (Lowell, J.) found as a fact that damages had been suffered by the petitioners (Rec. p. 19, fol. 21). See also Judge Brewster's opinion (R. p. 15).

It is entirely unnecessary, of course, to prove damages, to be entitled to an award of statutory damages "in lieu of actual dam-

ages" under section 25. Congress abandoned the common law requirement as to the proof of actual damages and permitted the District Court to award "such damages as to the court shall appear to be just", "in lieu of actual damages", and where plaintiffs are unable to prove actual damages. In practically all copyright cases, the plaintiff is unable to prove actual damages. Nevertheless in such cases this Court has said the District Court *must* award the minimum of $250 and in its discretion may award more. The power to award statutory damages is worthless, if a plaintiff must still prove—actual damages.

(2) Respondents further have relied upon the case of *Turner & Dahnken* v. *Crowley*, 252 F. 749 (C. C. A. 9), as authority for the action of the Circuit Court of Appeals herein in reducing the award of damages. This case was decided before the decision of this Court in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100. In this case $7000 statutory damages were awarded by the District Court for 7000 copies of an infringing song. The Court of Appeals for the Ninth Circuit reduced the award to $560 actual damages at 8c per copy lost profit. The original award of $7000 statutory damages was, of course, improper under Section 25 and should have been limited to $5000. The case may be distinguishable because actual damages were proved. But so far as there is anything in the case contrary to the decisions of this Court in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, and *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, it has, of course, been overruled.

(3) The respondents have also intimated that the District Judge's award was influenced by a "sense of irritation" at their publishing the infringing story as news, when it was entirely fictitious (Brief before Court of Appeals, p. 5). It is submitted that on the record this innuendo is entirely unwarranted. The same District Judge (Lowell) dismissed the original bill of complaint on defendant's motion on the ground that The American Mercury Inc., was a necessary party plaintiff, when the only decision precisely in point on the question (*Witwer* v. *Harold Lloyd Corporation*, 46 F. (2d) 792 at 794, in D. C. S. D. Cal. C. D.) was contrary.

If Judge Lowell were actuated by a "sense of irritation",—on the state of the authorities he certainly need not have ruled in defendant's favor in dismissing the original bill of complaint.

(4) Respondents and the Circuit Court of Appeals (majority opinion) have advanced the argument that the proper *administration* of Section 25 requires, in all copyright cases where a plaintiff is unable to prove actual damages, that only the minimum statutory damages of $250 should be awarded. The Court of Appeals (majority opinion) has gone further in holding that Section 25 must be so *construed*, and that the award of larger damages constitutes an abuse of the District Court's discretion. The Court of Appeals (majority opinion) said (R. p. 33):

> "Where no actual damages are proven or are shown to have resulted, there has been a clearly marked tendency by the courts to limit the award in lieu of actual damages to the minimum amount. See *Insurance Press* v. *Ford Motor Co.*, 255 F. 896; *Altman* v. *New Haven Union Co.*, 254 F. 113; *Fisher, Inc.* v. *Dillingham*, 298 F. 145; *Sauer* v. *Detroit Times*, 247 F. 687; *Waterson et al*, v. *Tollefson*, 253 F. 859; *Cravens* v. *Retain Credit Men's Ass'n*, 26 F. (2d) 833."

Whether this statement is true or not, it is clear that even in such cases the District Court nevertheless has the power in its discretion to award the *maximum* of $5000 damages if such damages appear to the court to be just, as has been shown above. The amount found as damages in one case has no bearing whatever as to the amount of damages suffered in another case, unless the facts are the same. Each case stands on its own facts. *In the six cases above cited where the minimum of $250 statutory damages was awarded the facts are entirely different from the facts in the present case.* In the first three cases, the infringement was entirely innocent and was so found, in the 4th case the defendant thought it had a license and was not intentionally infringing, in the 5th there was but one infringing performance of the copyrighted of musical composition, and in the last case *less* than 250 copies of the infringing books were printed or sold. In the last two cases the Court could

not have awarded more than $250 (*Jewell-LaSalle Realty Co.* v. *Buck, supra*).

In the present case the infringement by the respondent Cunningham was not innocent, but was flagrant and wilful and in addition 384,834 copies of the infringing story were sold.

Contrary to the view of the Circuit Court of Appeals, in cases where the facts are similar to those shown in the present case, there is "a clearly marked tendency by the courts" to award considerably more than the minimum damages, even though the plaintiff is unable to prove actual damages. In the following cases, the infringement was intentional in each case and the amounts noted were awarded as statutory damages for the number of infringing copies indicated:

$2500 for 2800 copies of infringing books—
Hendricks v. *Thomas Publishing Co.*, 242 F. 37 (C.C.A. 2).

$4000 for 4000 copies of infringing advertising cuts—
Campbell v. *Wireback*, 269 F. 372, (C.C.A. 4).

$3000 for 15,000 distributed copies of an infringing pamphlet—
No-Leak-O Piston Ring Co. v. *Norris*, 277 F. 951 (C.C.A. 4).

$2000 for 5000 copies of an infringing map—
General Drafting Co. v. *Andrews*, 37 F. (2d) 54 (C.C.A. 2).

$1000 for an unknown number of infringing books—
Warren v. *White & Wyckoff Mfg. Co.*, 39 F. (2d) 922 (D.C.S.D.N.Y.).

$8000 for 8000 copies of an infringing book—
Schellberg v. *Empringham*, 36 F. (2d) 991 (D.C.S.D.N.Y.)*

*(In this case the award in excess of $5000 at the rate of $1 per copy was permissible because the defendants continued the infringement after actual notice of the copyright was given by plaintiff, under the exception provided in Sec. 25 in such cases).

The District Court, as trier of the facts, placed the present case in the category of the six cases last cited, and awarded the damages it believed just. Under the statute its discretion is controlling when within the limits provided.

The District Court's award of $5000 damages in the instant case was entirely just and reasonable. The infringement was particularly flagrant and wilful, without extenuating circumstances of any kind which might commend themselves to a court of equity. The District Court administered the copyright law in accordance with its spirit and intent and in a manner to protect the literary property of an author against the pirating of unscrupulous individuals. The innocent and wronged persons here are the petitioners. The wrongdoers are the respondents. They have only themselves to blame for their being required to compensate the petitioners for the wrong they have done them. Respondents are now asking this court to affirm the action of the Circuit Court of Appeals in holding in effect that the copyright Act should be administered and construed in a manner to protect the unscrupulous infringer, and in effect to give him a license to pirate any literary property at will on the payment of $250 maximum damages to the author, and to allow him to lead the author on a long chase through the courts to collect that. It is submitted that this court should protect the author instead, by reversing the Circuit Court of Appeals and affirming the award of the District Court as to damages.

Request for Additional Attorneys' Fee.

Under Section 40 of the copyright act this Court is empowered to award the petitioners a reasonable attorney's fee to compensate them for the expense of proceedings in this court. It is submitted that it is unjust for the respondents to cause the petitioners additional legal expenses in appealing to this Court, when the petitioners' cause of action is admittedly just and the respondents have no defense whatever.

The petitioners hereby respectfully petition this Court for an award of such additional sum as a reasonable attorney's fee as

will compensate the petitioners for the legal expenses incurred by them in the proceedings in this Court.

CONCLUSION.

The present Copyright Law, and particularly Section 25, is the fruit of more than one hundred years' experience in endeavoring to protect the author and his property in his writings. The provisions of Section 25 represent the accumulated wisdom of years in providing an effective remedy for the owner of literary property against the depredations of the literary pirate. In the twenty-five years the present Copyright Law has been in existence it has worked remarkably well, and the keystone of the structure has been Section 25. In Section 25 Congress endeavored to give the District Court complete discretion to award, in lieu of actual damages and profits, such damages as to the Court shall appear to be just, within the limits of $250 and $5000. It is of the utmost importance to the effective administration of the Copyright Law that this discretionary power reposed by Congress in the District Court to award statutory damages, and to award the maximum damages of $5000, or more than the minimum damages, in those cases in which such damages appear to the Court to be just, be preserved. Otherwise the Copyright Law will collapse for lack of an effective remedy, and will be reduced to its state of impotence prior to 1909, when unscrupulous persons could infringe with impunity.

The power of the District Court to award the Statutory damages of $5000 in the case of an infringement and sale of infringing copies of the nature and number here shown, under Section 25 of the Copyright Act, is unquestionable. The evidence clearly justified the damages awarded and on the facts and as a matter of law, there could be no abuse of the District Court's discretion in awarding them. The District Court, sitting as a Court of Equity, and as trier of the facts, in the exercise of its sound discretion awarded the damages it believed just. The action of the District Court was clearly within the law. The action of the Circuit Court

of Appeals in reversing the District Court, on the other hand, was erroneous and clearly outside the law.

We respectfully submit that the decision of the Circuit Court of Appeals for the First Circuit in holding the award of $5000 damages under the circumstances stated to be an abuse of the District Court's discretion, is in conflict with the express language of Section 25 of the Copyright Act and with its plain meaning as determined from its legislative history, and is in conflict with the decisions of this Court and other Circuit Courts of Appeals and District Courts construing the section, and is in conflict with the settled rules of statutory construction laid down by this Court.

We therefore respectfully submit that the decree of the Circuit Court of Appeals for the First Circuit should be reversed and the decree of the District Court as to damages should be affirmed.

Respectfully submitted,

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CEDRIC W. PORTER,
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Boston, Massachusetts,
January 9, 1935.

APPENDIX.

Comparison of Similarities and Differences Between Douglas and Cunningham Stories.

Douglas.	*Cunningham.*
1. Story told by Lizzie Gritts, keeper of Oklahoma beer joint, and by the girl—to writer.	Story told by sheriff in Oklahoma beer joint in the girl's presence—to the writer.
2. Hero — Adam Kapechik — Polish.	Hero — Joe, the Polack — last name all C's, Z's and X's.
3. Hero—Ran a cobbler shop —sold cigarettes—shop became a hangout for the boys.	Hero—Worked in Old Man Trafton's Square Deal Grocery and Butcher Shop as delivery boy. When shop given to Joe, he put in pool tables, cold drinks —became stag hangout.
4. Hero served in war — Marines—severely wounded at Chateau Thierry, twice decorated for individual heroism.	Hero served in war—Marines—At Chateau Thierry rescued wounded Captain from No Man's Land — wounded, but charged machine gun nest with hand grenades.
5. Hero quiet, unassuming, reserved, kept to himself—had no girls but was well liked.	Hero quiet, unassuming, reserved, kept to himself—had no girls but was well liked.
6. Girl—blonde, pretty, came from Arkansas border—had no folks in town—worked as sales girl in notion store. Got reputation as being "easy", called "Round Heels" by the boys.	Girl named Mae, blonde, pretty, drifted into town — worked as waitress in Elite Restaurant—known as "fast" among the boys.

7. Hero never went out with the girl "calf-eyed" about her—struck fellow who talked about her.	Joe was not like the other fellows with the girl Mae—never fresh to her—never tried to date her up.
8. Girl scorned Faulkner, the Klan organizer, who tried to pick her up, ridiculed him publicly, incurred his enmity. Said: "A dirty little old man trying to chase girls young enough to be his daughter."	Mae slapped face of County Judge Eldridge, the Ku Klux K. Kleagle, when he asked her to go out with him, while serving him at restaurant—bawled him out publicly. Said: "Why, you dirty old devil — why, you've got daughters older than I am."
9. Ku Klux met in Odd Fellows Hall.	Ku Klux met in Odd Fellows Hall.
10. Johnny Sakheimer, out with "Round Heels" parked in car along side the road—when Klansmen surrounded them.	Mae parked in car beside road with cook at Elite Restaurant when Klansmen surrounded them.
11. Boy, fighting, was strung up —whipped—left on ground. Girl fought like wildcat, handkerchief stuffed in her mouth — strung up — stripped of almost all her clothing, and whipped by Parson Doty—both left on road side.	Boy dazed from blow—whipped once or twice—fell unconscious and dumped into his flivver. Handkerchief stuffed in girl's mouth—girl kicking and fighting like tigress was stripped of almost all her clothing, whipped by Judge Eldridge—left bleeding on grass.
12. Girl found on roadside by Adam while taking a walk. Carried her to Lizzie Gritts' house, where they looked after wounds, while girl told story.	Girl staggered back to town and collapsed on Joe's doorstep and Joe and Indian housekeeper looked after her wounds while girl told story.

13. Ku Klux parade on July 4th up Main St. Adam had gotten machine gun from armory at Oklahoma City—had belonged to National Guard and mounted machine gun on top of McMaster Bldg. at corner of Sixth and Main Streets. Dressed in full uniform with his medals on. Faulkner was in reviewing stand. Adam got machine gun into action from 100 yards, got Rev. Narcissus Harper through forehead and another through stomach. Then gun jammed. Sheriff shot Adam through head.

End.

Ku Klux parade on July 4th up Main St. from Forest St. Joe's Bldg. at corner. Parade headed by Judge Eldridge and as it turned into Main St. from Forest, Joe got his machine gun into action — which he had obtained from armory to which he had keys—got the judge and four others when machine gun jammed. Joe found on roof dressed in overseas uniform with his medal on. One of cops let Joe have it and the cops in that country can shoot.

14. Monument (beginning of story) to Adam reciting war services—injury to mind—who gave way during patriot's parade and fired machine gun into marchers. Erected by popular subscription.

Gravestone with tablet reciting gallantry in war. Mind unbalanced which lead to his death. Tablet erected by citizens who admired him.

15. Girl showed scars to writer for $5. and again when telling story later. Looked forty instead of what she was—twenty-two.

Girl shows scars so sheriff told tale. Girl went to hospital six months and came out an old woman.

End.